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No. 01-1117

IN THE
Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Once one gets by the "attitude" that characterizes respondents' Brief in Opposition (BIO), one quickly comes to the realization that this matter is all the more certworthy. The (unintended) consequence of the BIO, "attitude" and all, is a reaffirmation of the certworthiness of this matter and a thorough demonstration of additional reasons why this Court should agree to hear the far-reaching First Amendment issues raised by this case at this stage.

1. The Content-Based Regulation Issue and the Appropriate Standard of Scrutiny. Respondents concede that school-initiated targeted communication is proscribed under the recruiting rule "for athletic purposes." This concession[1] reinforces petitioner's claim that speech is circumscribed based on content (*i.e.*, the subject matter of the expression). *Cf. Burson v. Freeman*, 504 U.S. 191, 197 (1992)(stating that campaign-free zone around polling places was content-based regulation of expression because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign"). The court of appeals' contrary finding is, as respondents' submission now demonstrates, in considerable tension with (and, arguably, in direct conflict with) the Eighth Circuit's approach in *Republican Party v. Kelly*, 247 F.3d 854, 863 (8th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2001)(No. 01-521)(oral argument set for 3-26-02)(holding limit on judicial campaign speech content-based because it "depend[s] entirely on the subject matter of the speech"). In *Kelly*, which is pending in this Court, the court of appeals applied strict scrutiny to an analogous speech restriction; no

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[1] The district court found the prohibition on speech, based on the interpretive guidelines, to be much broader: "[A]ny school representative ... is prohibited from making an 'initial contact' with prospective student-athletes outside the 'feeder' pattern for any reason until the student is enrolled at the school." App. at 40-B. *Cf.* BIO at 2 n.3.

party has challenged the applicability of strict scrutiny in that case.

The application of intermediate scrutiny by the court of appeals in this matter is substantial error and worthy of review by this Court because content-based regulations are subject to strict scrutiny. *Hill v. Colorado*, 120 S. Ct. 2480, 2500 (2000) (Souter, J., concurring)(noting that "the government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects"). Respondents challenge that fundamental First Amendment precept. BIO at 19-20. This case presents an excellent vehicle for clarifying the nature, scope, and analysis of content-based regulation of speech. If allowed to stand, the case could undermine any approach to speech restriction adopted by this Court in *Kelly* since the *Kelly* case has been litigated on the assumption that strict scrutiny is the appropriate standard.[2]

2. The Secondary Effects Analysis. From the outset, respondents' concern in promulgating and enforcing the speech-restrictive components of the recruiting rule has been the fear that students will learn about athletic and academic opportunities that they might find attractive and that those students might act upon that information by choosing a non-public school option (a protected liberty under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). The district court concluded that the rule's ban on expression "has the effect of preventing any influence on a student, not just 'undue' influence." App. at 48-B (emphasis in original).

The court of appeals held that the rule's ban on speech was not aimed at this "primary" effect but on a gossamer "secondary" effect, which was not identified or

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[2] The ban on speech in this case extends beyond that in *Kelly* in that the ban in *Kelly* does not apply to entities for which the candidate is not responsible, whereas in this case the school is liable for the speech of parties over which it has no control.

defined. It reasoned that the recruiting rule was a content-neutral regulation because it "does not completely ban all communications between coaches and prospective students." App. at 15-A. The existence of alternative modes of communication led to the conclusion that the rule was aimed at "secondary" effects.

But, as the Petition showed (pp. 15-18; 21-25), such an application of the "secondary" effects analysis is fundamentally flawed and at odds with this Court's treatment of the "secondary" effects concept. So, in their response, respondents have sought to develop a new theory in support of the court of appeals' "secondary" effects analysis.

Respondents now contend that the recruiting rule restricts "specific conduct regardless of content." (p.13). Putting to one side the obvious tension between this stance and respondents' position that the rule only applies to speech "for athletic purposes," respondents understand the need, under the "secondary" effects doctrine, to define "proscribable conduct" independent of and unrelated to the suppression of expression. *Id.* at 13-14. This recognition by the respondents further undermines the position of the court of appeals, which identified no such independently "proscribable conduct."

The "proscribable conduct" identified by respondents is the "content-neutral conduct" of "athletic recruiting." *Id.* Respondents describe "athletic recruiting" as "an act, an occurrence, an event." For respondents, "the simple conduct of athletic recruiting is a proscribable event," and that is true "[r]egardless of the specific content of any recruiter's message." *Id.* at 14. The broad, even breathtaking, stance of respondents is clear from their view that "the mere *occurrence* of recruiting may be regulated subject to intermediate scrutiny because State regulation is triggered by the event rather than the content of any speech during the event." *Id.* at 15 (emphasis in original). For respondents,

"[a]ll conduct within the parameters of the recruiting rule is proscribable regardless of any substantive differences in the messages or techniques employed by the solicitor." *Id.* at 16.

Respondents' view treats "speech" as just another form of proscribable "conduct." But the First Amendment's protection of speech refutes that idea. Speech is not just another form of proscribable "conduct." Further, the suppression of speech, under this rationale, is directly related to the underlying regulatory objective – the prohibition of athletic recruiting. School-initiated targeted speech aimed at informing students about educational opportunities that include opportunities in the field of athletics is prohibited because such a ban is part of an overall strategy of barring athletic recruiting. As applied to such speech, the apparent concern is with the impact of that speech on the listener – *i.e.*, its "primary" effect. Speech unrelated to "athletic purposes" is, according to respondents, permitted, so it is not just speech, but speech about certain matters, that is barred. That is a ban on "primary" not "secondary" effects.

The district court found that the ban was not content-neutral because it "was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by ... school representatives outside the student's feeder pattern." App. at 43-B. Respondents do not "have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade students that the educational experience at the school is superior to that to be gained at another school." That is, "it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses." Thus, "[i]n the competition among schools for students, the First Amendment prohibits the State from favoring one side of the debate by suppressing

the speech of the other... The TSSAA cannot control school choice through censorship." *Id.* at 45-46-B.

Moreover, respondents do not really define what underlies a ban on "athletic recruiting," at least as it relates to First-Amendment-protected speech. The recruiting rule prohibits use of "undue influence" in securing or retaining a student "for athletic purposes." With respect to non-speech-related conduct, petitioner has always supported restrictions on conduct such as remuneration or other similar inducements for enrollment. Those issues are not before the Court in this matter.

With respect to speech-related activity, the district court concluded that respondents have a "substantial interest in preventing a student from being threatened, coerced, or harassed." *Id.* at 45-B. But TSSAA has never presented evidence that the recruiting rule ban was enacted because "student-athletes were being harmed as a result of initial contact by school representatives, including the school's coaching staff." *Id.* at 46-B.

As respondents now concede, apparently, "undue influence" in the context of school-initiated targeted speech means "any" influence triggered by First-Amendment-protected expression. Students and their parents are barred from receiving school-initiated targeted communications, "regardless of ... the messages or techniques employed by the solicitor." BIO at 16. Thus, any claim to restriction on speech because of coercion or overreaching is eschewed. Expression aimed at informing students about educational opportunities is banned if it seeks to influence a family's school-choice decision because of "athletic purposes."[3]

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[3] Respondents' contention that "athletic purposes" is defined by the intent of the speaker raises serious chilling effect issues, since much permitted speech could be deterred because of concern about its

Such a regulatory regime, which bans a category of speech because the speech itself contributes to the "proscribable conduct" the state seeks to regulate, extends the "secondary" effects doctrine well beyond its current parameters. *See* Petition at 23-24 (discussing *Boos v. Barry*, 485 U.S. 312 (1988)).

3. The Excessive Discretion Issue. The Petition describes two types of discretion that raise substantial First Amendment concerns. The BIO confirms petitioner's stance on this issue.

(a) The imprecision of the "undue influence" and "appropriate or normal" standard, especially as it relates to protected speech, leaves "unbridled discretion" in the TSSAA as the regulatory enforcement authority, as the district court held. App. at 54-57-B. This subjects the recruitment rule to a facial challenge. *See* Petition at 26-29.

The interpretive commentary establishes some categories of *per se* illegality but does not supersede the underlying "undue influence" standard. The court of appeals acknowledged that "the recruiting rule by itself is certainly subject to challenge," but concluded that the "interpretive commentary" saves it from facial challenge on grounds of excessive discretion. App. at 22-A. Respondents seem now to concede, however, that the underlying rule itself controls and that the interpretive guidelines should not be "elevate[d] ... to a higher level than the rule itself." BIO at 2 n.3. This reaffirms petitioner's position, further undermining the court of appeals' position on the discretion issue.

(b) The discretion accorded to respondent Carter to waive the recruiting rule is unbridled and therefore subjects the rule to a facial challenge. Petition at 5; App. at 6-D. The Petition focused on the portion of the waiver provision that

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permissibility based on a school's state of mind and the harassment that could ensue from a hostile enforcement authority.

allows the Executive Director of TSSAA to waive the recruiting rule "when in his opinion the rule fails to accomplish [its] purpose." The waiver rule, which is written in the disjunctive on this point, also provides for waiver in cases of "undue hardship." These two grounds for waiver are separate and distinct.

Respondents contend that the Executive Director's discretion is "bridled" by the next sentence, which requires that the "conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and/or his or her parents." BIO at 3 and n.4. The qualifying language applies to the "undue hardship" situation but self-evidently has no application to situations when, in the Executive Director's opinion, "the rule fails to accomplish the purpose for which it is intended." App. at 6-D.

Even in the "undue hardship" situation, the qualifying language still does not cabin the Executive Director's discretion. The recruiting rule applies to persons "not connected" to a school, App. at 1-D, and therefore to conduct "beyond the control of the school." From the universe of those events, the Executive Director has uncabined discretion in determining which such acts (of speech in this case) will be enforced and which ones will be waived as they affect prospective students.

Respondents assert that "none of the violations" in this case were based on an exercise of "unbridled discretion" by TSSAA. BIO at 5. But the existence of excessive discretion allows for a facial challenge, not just a challenge of a particular application of the rule. Proof of an "abuse of power in the particular case" is not required to make out a facial challenge. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Thus, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator

has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

4. The "Audience of Minors" Issue. TSSAA purports to defend the speech-restrictive elements of the recruiting rule by asserting that the rule is "directed to an audience of minor school children." BIO at 22. The recruiting rule cannot be defended on this ground since it prohibits school-initiated targeted speech directed at either students or their parents (or guardians). App. at 1-D. The rule cannot be justified on this basis since that is not the basis upon which it has been enacted or enforced. The rule, therefore, is of more generalized application and significance, and its purported justification more akin to that in *Republican Party v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2001).

5. The Anti-Solicitation Issue. The court of appeals failed to consider the First Amendment protection given to solicitation. The recruiting rule is an anti-solicitation restriction on school-initiated targeted expression. The solicitation and charitable solicitation cases demonstrate that strict scrutiny applies in such situations. *In re Primus*, 436 U.S. 412, 432 (1978); *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988). As it also did in *Watchtower Bible & Tract Soc'y v. Stratton*, 240 F.3d 553 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 392 (2001), the Sixth Circuit failed to take into consideration the First-Amendment-protected status of expression through the medium of solicitation, even while recognizing that the speech proscribed by the recruiting rule is non-commercial speech.

Strikingly, respondents do not really defend the court of appeals' analysis. Instead, they rely on solicitation cases involving commercial speech to defend the standard that the

court of appeals applied to non-commercial speech. The court of appeals, however, properly rejected respondents' position that the speech was commercial speech. The recruiting rule clearly applies to non-commercial exchanges (such as the two communications in the as-applied component of this case, which involved informational communications about spring football practice to students who had already agreed to matriculate the next fall and had signed contracts to that effect).

6. The Competitive Equity Issue. TSSAA argues that it can promote a level competitive playing field not only by prohibiting athletic recruiting conduct (such as use of financial blandishments) – a ban petitioner has always supported – but also by suppressing or censoring speech. This commodifies students, subordinating their choice of educational opportunities to the interests of public schools, their coaches and boosters in winning sports championships. This makes these athletically gifted students, who might well believe that athletic opportunity is an important component of their educational experience and an important ingredient in their selection of schools, "mere creature[s] of the state," which the state cannot do. *Pierce*, 268 U.S. at 535.

TSSAA's acknowledgment that the suppression of speech is in substantial part justified on grounds of competitive equity also indicates that TSSAA's concern is that students hearing a message will act upon that communication – a "primary" not some "secondary" effect of the speech and, as the district court held, a content-based regulation. The suppression of speech because of its possibly successful impact on the listener is foreign to conventional First Amendment doctrine. *See* Petition at 24-25. To the extent that respondents claim that this case should be governed by this Court's narrow campaign-contributions jurisprudence, that makes the case even more, not less, certworthy. *See* BIO at 9-10.

Respectfully submitted,

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